



DEPARTMENT OF DEFENSE

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Office of the Secretary

[Docket ID: DoD-2010-OS-0183]

32 CFR Part 311

Privacy Act; Implementation

AGENCY: Office of the Secretary, DoD.

ACTION: Final rule.

SUMMARY: The Office of the Secretary of Defense is exempting those records contained in DMDC 15 DoD, entitled "Armed Services Military Accession Testing" when the record includes the specific answers submitted and the answer key. Releasing this information to the individual will compromise the objectivity or fairness of the test if the correct or incorrect answers are released.

DATES: This rule is effective [INSERT DATE THIS RULE IS PUBLISHED IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Mrs. Cindy Allard at (703) 588-6830.

SUPPLEMENTARY INFORMATION:

The Proposed Rule was published on January 3, 2011, in the Federal Register (76 FR 56-57). During the comment period, two public comments were received.

The first commenter asserted that the proposed Privacy Act exemption rule "could possibly be viewed as a violation of [the] constitutional rights...[of] U.S. citizen[s]," making reference to the Third, Fifth, Sixth, and Fourteenth Amendments of the Constitution. Also the first commenter commented that the provision "of the answers and/or answer keys should be at the discretion of the test taker, i.e., U.S. citizens."

The Privacy Act exemption rule addresses an individual's answers to the Armed Services Vocational Aptitude Battery (ASVAB) and the appropriate answer key, allowing the Department of Defense to exempt an individual's ASVAB answers and the answer key from the access provisions of the Privacy Act of 1974.

The exemption rule is intended to ensure that individuals will not compromise the purpose of the ASVAB - to ascertain the skills and abilities of individuals joining the military or seeking to join the military. If individuals were allowed to have the specific responses to the questions as well as the correct answers, the Department of Defense would be unable to ensure that individuals were placed in jobs for which they had an aptitude, or more importantly, placed in jobs for which they had no aptitude. If individuals were allowed to have their

individual responses as well as the correct answers, the integrity and scoring of the battery would be compromised rendering the testing worthless.

Individuals taking the test are provided a copy of their scores along with an explanation of what the given scores indicate.

The exemption rule is consistent with the Privacy Act, its underlying purposes, and the U.S. Constitution. Further, the rules published at 32 CFR part 311, The OSD Privacy Program, provide individuals an opportunity to appeal the denial of access to their records, which could include the consideration of alleged constitutional rights violations arising out of the denial of access to requested records.

The second commenter did not address the proposed exemption rule but addressed the first commenter's comments.

Executive Order 12866, "Regulatory Planning and Review" and Executive Order 13563, "Improving Regulation and Regulatory Review".

It has been determined that Privacy Act rules for the Department of Defense are not significant rules. The rules do not (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy; a sector of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in these Executive orders.

Public Law 96-354, "Regulatory Flexibility Act" (5 U.S.C. Chapter 6).

It has been determined that this Privacy Act rule for the Department of Defense does not have significant economic impact on a substantial number of small entities because it is concerned only with the administration of Privacy Act systems of records within the Department of Defense.

Public Law 95-511, "Paperwork Reduction Act" (44 U.S.C. Chapter 35).

It has been determined that this Privacy Act rule for the Department of Defense imposes no information requirements beyond the Department of Defense and that the information collected within the Department of Defense is necessary and consistent with 5 U.S.C. 552a, known as the Privacy Act of 1974.

Section 202, Public Law 104-4, "Unfunded Mandates Reform Act".

It has been determined that this Privacy Act rulemaking for the Department of Defense does not involve a Federal mandate that may result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100 million or more and that such rulemaking will not significantly or uniquely affect small governments.

Executive Order 13132, "Federalism".

It has been determined that the Privacy Act rules for the Department of Defense do not have federalism implications. The

rule does not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government.

#### List of Subjects in 32 CFR Part 311

Privacy.

Accordingly, 32 CFR part 311 is amended to read as follows:

#### PART 311—OFFICE OF THE SECRETARY OF DEFENSE AND JOINT STAFF PRIVACY PROGRAM

1. The authority citation for 32 CFR part 311 continues to read as follows:

Authority: Pub. L. 93-579, 88 Stat. 1986 (5 U.S.C. 522a).

2. Section 311.8 is amended by adding paragraph (c)(16) to read as follows:

§ 311.8 Procedures for exemptions.

\* \* \* \* \*

(c) \* \* \*

(16) System identifier and name: DMDC 15 DoD, Armed Services Military Accession Testing.

(i) *Exemption:* Testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service or military service may be exempt pursuant to 5 U.S.C. 552a (k) (6), if the disclosure would compromise the objectivity or fairness of the test or examination process. Therefore, portions of the system of records may be exempt pursuant to 5 U.S.C. 552a(d).

(ii) *Authority:* 5 U.S.C. 552a(k) (6).

(iii) *Reasons:* (A) An exemption is required for those portions of the Skill Qualification Test system pertaining to individual item responses and scoring keys to preclude compromise of the test and to ensure fairness and objectivity of the evaluation system.

(B) From subsections (d) (1) when access to those portions of the Skill Qualification Test records would reveal the individual item responses and scoring keys. Disclosure of the individual item responses and scoring keys will compromise the objectivity

and fairness of the test as well as the validity of future tests resulting in the Department being unable to use the testing battery as an individual assessment tool.

\* \* \* \* \*

DATED: February 28, 2012.

Patricia L. Toppings

OSD Federal Register Liaison Officer, Department of Defense

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